DOCUMENT RESUME

ED 197 394 CS 503 203

AUTHOR Gossett, John
TITLE Stock Issues in Legal Argumentation: The Role of "Facts".
PUB DATE Nov 80
NOTE 14p.: Paper presented at the Annual Meeting of the Speech Communication Association (66th, New York, NY, November 13-16, 1980).

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Communication Research: *Court Litigation: *Criminal Law: Debate: *Discourse Analysis: Higher Education: *Persuasive Discourse

ABSTRACT

An investigation into the types of propositions used in criminal trials reveals that the question being adjudicated in criminal trials is a proposition of fact that may or may not be influenced by policy and value considerations. The argument is offered that the proposition of fact identifies the ultimate issue in a legal debate. While value considerations such as believability of the victim may influence the jury's decision, believability is not the ultimate issue. In addition, while juries may be asked at a later date to make policy decisions regarding the fates of defendants after guilty verdicts have been rendered, such policy decisions are not the ultimate issues in the trial phase. Value and policy questions may influence the trial, but a criminal trial must be regarded as a debate on a proposition of fact. There are essentially six stock issues pertinent to a controversy of fact: who, what, when, where, why, and how. These stock issues are more formally stated as the elements in a case that support proposition of fact: definition, subject, locus, means, and purpose. (RL)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

U S DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

ED197394

STOCK ISSUES IN LEGAL ARGUMENTATION:

The Role of "Fact"

by

John Gossett

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

John Gossett

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

Presented to

Speech Communication Association Convention

New York City

November 16, 1980

CS503203

STOCK ISSUES IN LEGAL ARGUMENTATION:

The Role of "Fact"

In the American legal system, there are many fields of argument. At a very rudimentary level, argument exists in the field of civil law, the field of criminal law, and the field of appellate law. However, in any of these fields, there are but two sides in a given controversy, the advocate in favor of change and the advocate against change. In criminal law, the advocate in favor of change is the prosecutor and the advocate against change is the defense attorney. Inherent in this arena of argument known as a criminal trial is a proposition which is supported by the advocate of change. Before the arguments of each side are presented, it is necessary for both sides to understand precisely what dispute is being adjudicated in the argumentative forum. The dispute involves a question, worded in the form of a proposition, which is supported by the advocate of change, and must be a statement that identifies the central elements of the dispute. The need for a proposition is established by Toulmin when he notes that in legal argumentation, "There must be an initial stage at which the charge or claim is clearly stated. . . ."[1] This essay is an investigation into the types of propositions used in criminal trials. In spite of Willard's claim that "Trials are a relatively minor feature of jurisprudence," courtroom advocacy provides the opportunity to study one of the most visible aspects of argumentation.[2]

The nature of propositions in criminal trials is a notion that has been previously addressed. However, the issue remains unsettled. Ralph Towne and Stephen M. Weiss maintain that in rape trials the dispute being adjudicated is a proposition of policy as well as a proposition of value.[3] This paper disagrees. It is the contention of this paper that in criminal trials, the question being adjudicated is a proposition of fact, which may or may not be influenced by policy and value considerations.

The Issues

Any discussion of the stock issues in legal argumentation must, of necessity, include explanation of what is meant by the term "issue." Smith and Hunsaker indicate that ". . . an issue asks a question crucial to a controversy."[4] Ehninger and Brockriede provide more insight: ". . . an issue is a question so vital to the life of the challenger's cause that unless it is answered in his favor his cause as a whole must fail."[5] An issue, then, is different from an argument. Several arguments may be combined to constitute an issue, but an issue is far more crucial to the success of the advocate's cause than is a single argument.

The types of issues vary depending on the nature of the dispute being resolved. Freeley maintains that issues are the central components of three types of propositions: fact, value, and policy.[6] In propositions of fact the affirmative maintains that something is true, while the negative maintains that it is false. In propositions of value the affirmative maintains that

a certain thing is good, beneficial, proper, virtuous or admirable. In propositions of policy the affirmative maintains that a policy or course of action should be adopted, while the negative maintains that the policy should be rejected.[7] Issues ask questions about objects or events. Using Freeley's guide, issues of fact ask whether or not something is true; issues of value ask whether or not something is good; and issues of policy ask whether or not something should be done.

Smith and Hunsaker divide issues into two types: issues of belief and issues of policy.[8] Issues of belief may be one of three types: issues of fact, issues of explanation, and issues of value.[9] Using this framework it may be assumed that issues of fact ask questions about the external world and with enough data, the answers to the questions may be empirically verified. Issues, then, are the claims made by the advocate that are inherent in the proposition and are determined by the type of proposition. Propositions are the basic elements of argument, and the issues in a dispute emerge from that proposition.[10]

The ultimate issue is the one identified by the proposition being debated. In a criminal trial, the proposition asks jurors to decide whether or not the defendant is guilty of a specific charge contained in an indictment. In civil trials and in legal proceedings before an appellate tribunal the ultimate issue will be different. However, in a criminal trial, the ultimate issue, and therefore the proposition, asks the jurors to make a simple yes or no decision.

Towne and Weiss claim that the jury in a criminal trial is

an investigatory body established for truth-seeking.[11] This claim is inconsistent with many of the goals of American jurisprudence. A criminal trial is not a search for Truth. Some contend that Truth exists. Ziegelmueller and Dause argue that "[u]litimate truth in any situation does exist, even if man is incapable of knowing that truth with certainty."[12] However, Truth is not synonomous with fact. Smith and Hunsaker point out that "what is Truth?" is not an issue of fact. This is so, they claim, because Truth exists in the mind, not in the external world, and that Truth, in the abstract, cannot be empirically verified.[13]

Instead of being a search for Truth, criminal trials merely ask the jurors to affirm or deny the proposition advocated by the prosecutor. Claiming that trials seek Truth fails to recognize many of the due process guarantees provided by the Constitution. The goal of the criminal justice system focuses on the fair administration of justice, not on Truth. Mr. Justice Owen Roberts explains that a fair trial

> . . . is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, though the result is just, if the hearing was unfair.[14]

Two functions of the judiciary underscore the importance of this goal. First, the judiciary must embrace impartiality in order to provide fair and effective administration of justice. The judge must provide a forum for discussion of the charge. But that forum must be free from outside influence. This applies not

only to the jury, but to the judge as well. In 1941, the Supreme Court observed:

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges [and jurors] as free, impartial and independent as the lot of humanity will admit.[15]

The second function of the judiciary is to protect the decorum of the courtroom. Judicial proceedings must not be conducted in a carnival atmosphere. Mr. Justice Hugo Black noted that, "The very purpose of a court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures."[16] These two functions clearly establish the importance of fairness, rather than a mere search for what is True. Due process guarantees temper a search for Truth.

In order to adjudicate the ultimate issue, the proposition, the jurors in a criminal trial must evaluate the stock issues embodied in propositions of fact. There are essentially six stock issues pertinent to a controversy of fact: who, what, when, where, why, and how.[17] These stock issues are more formally stated by Smith and Hunsaker as elements in a case which support propositions of fact: definition, subject, locus, means, and purpose. Definition refers to an act; has a crime been committed. Subject asks who committed the act. Locus refers to the time and place of the act. Means asks how the criminal act was committed. Purpose refers to the motives of the individual who committed the act.[18] Establishing each of these issues is a prima facie burden

for the prosecutor; the loss of but one constitutes grounds for dismissal of charges against the defendant.[19]

If the proposition being adjudicated in court were a proposition of policy these elements would still be crucial to the prosecution's case. However, in addition to these stock issues, the prosecutor would have the burden to demonstrate that a particular course of action, based on the proving of the issues, would be desirable. Should the jury decide that the advocated course of action would not be desirable, then the prosecutor's entire case would fall. This is true since one of the burdens for the advocate of change in a proposition of policy is showing the necessity and propriety of the proposed policy. Were the proposed action neither necessary nor proper, then the policy should be rejected.

If the proposition being adjudicated in the trial were a proposition of value it would be necessary for the prosecutor to demonstrate that the actions taken by a defendant were not beneficial. The crucial element in such a proposition is the judgment factor. Jurors would be asked to decide in such a situation whether the action taken by the defendant was good or bad. Such is not the case in criminal trials. The fact that an indictment has been returned by the grand jury indicates that the social order is upset. If the act committed were not considered in violation of the law, then the grand jury would not have issued an indictment. As this paper will later demonstrate, value judgments are a part of the determination of guilt, but the ultimate issue is not a proposition of value.

Factual Verdicts

Once the jury returns a verdict, the proposition is affirmed or denied. The jury verdict is not a statement of truth, it is a statement of fact. The verdict merely answers the question posed by the resolution: Is the defendant guilty of the crime charged in the indictment and pursued by the prosecutor? Even if the jury verdict is not true, it is fact. That fact is then assumed correct and becomes the presumption unless and until the verdict is overturned by an appellate court. If a guilty verdict is returned and the defendant wishes to appeal to a higher court, the defendant becomes the plaintiff and must assume the role of advocate in asking the higher court to alter the status quo by reversing the verdict of the trial jury. If the appellant is granted a new hearing a new proposition with a new set of issues is then debated in the appellate forum. The element of guilt may not be a major consideration in the decision making process at the appellate level. In fact, Toulmin, Rieke, and Janik note that appellate courts usually do not re-evaluate the merits of the competing stories presented during the trial phase.[20] A guilty verdict by a jury represents an affirmation of the resolution, and that statement of fact becomes the presumption which may be considered by appellate courts.

Value Considerations

Towne and Weiss contend that rape trials may be considered as situations where propositions of value are debated.[21] This contention is based on the claim that the believability of the

victim is a major factor which influences the jury. Towne and Weiss state:

> . . . to determine her [the victim's] believability, the jury must make use of a great deal more than the "fact" of the case described by the woman. At the very least they are making a very complicated value decision in the trial rather than trying to decide on the proposition of fact alone.[22]

Certainly, value decisions are among the many decisions made by the jurors. This process does not make the trial a debate over a proposition of value, however. When the judge asks the jury for a decision he does not ask them whether or not they believe the victim, he asks whether or not the defendant is guilty. The believability of the woman may be fundamental to the trial and the jury's decision, but believability is not the ultimate issue, and hence is not the proposition.

Policy Considerations

Towne and Weiss also maintain that rape trials may be considered as debates on propositions of policy.[23] This contention is based on an assumption that when the jury returns a guilty verdict, the jurors are saying not only that the defendant raped the victim, but that he should be punished as a result of the act. The authors assert that without this addition, there would be no reason to conduct a trial. The proposition offered by the authors using this assumption is stated as, "Resolved: That John Doe raped Jane Roe and should be punished for it."[24]

The history of the American criminal justice system disagrees with such a proposal. Historically, the punishment phase of a criminal proceeding is separate from the determination of

guilt phase. In states where juries determine the sentence, the punishment determination commences after the guilt determination. Additionally, during the punishment phase new witnesses may be subpoenaed, and the ultimate issue is different from the trial phase. In states where sentences are determined by the trial judge, jurors have no say in the sentence. Towne and Weiss agree that jurors are the decision makers in criminal trials, but if this is true, the previously-stated proposition of policy is not the ultimate issue in cases where jurors are removed from the sentencing phase.

Towne and Weiss offer a second policy proposition which may be at issue in a rape trial. The real proposition being debated, they say, is "Resolved: That you (the individual jury) should vote that the defendant John Doe raped Jane Roe."[25] This proposition disregards juror rationality. If this policy proposition were being debated at trial, the defense attorney might be expected to argue disadvantages to the proposed policy which would be unacceptable in debates on propositions of fact. For example, the defense might argue that the defendant has a wife and children who are dependent on the support provided by the defendant. To convict him would deny innocent persons many of the necessities of life. In debates on propositions of fact this disadvantage would be irrelevant to the decision. This argument should be saved for the sentencing phase; it has no direct relevance regarding the guilt of the accused. A second argument that the defense might raise if the trial were a proposition of policy might be a generic disadvantage relating to the evils of prison

life. Again, this type of argument should be a consideration in sentencing, but not in determination of guilt. Juror rationality should be assumed. Of course the jurors are aware that the prosecution seeks a conviction and the defense seeks acquittal. But the trial phase of the process dictates that jurors disregard information that is not directly related to guilt or innocence of the accused. After that determination is made, the benefits of particular methods of punishment may be introduced, assuming a guilty verdict is returned.

Conclusions

Towne and Weiss conclude that for either the prosecutor or the defense attorney "to assume that the topic being debated is a proposition of fact is probably incorrect."[26] This essay disagrees with that conclusion. The proposition identifies the ultimate issue in a debate. In rape trials, the ultimate issue is: Is the defendant guilty of rape as charged in the indictment? While value considerations such as believability of the victim may influence the jury's decision, believability is not the ultimate issue. In addition, while the jury may be asked at a later date to make a policy decision regarding the fate of the defendant after a guilty verdict is rendered, that policy decision is not the ultimate issue in the trial phase. Value and policy questions may influence the trial, but a criminal trial must be regarded as a debate on a proposition of fact.

NOTES

[1]Stephen Toulmin, Uses of Argument (Cambridge: Cambridge University Press, 1958), p. 16.

[2]Charles Arthur Willard, "Some Questions About Toulmin's View of Argument Fields," in Proceedings of the Summer Conference on Argumentation, ed. Jack Rhodes and Sara Newell (Falls Church, Virginia: Speech Communication Association, 1980), p. 365. Hereinafter referred to as Proceedings.

[3]Ralph Towne and Steven M. Weiss, "Theoretical Hurdles for the Advocate in Rape Trials," in Proceedings, pp. 62-67.

[4]Craig R. Smith and David M. Hunsaker, The Bases of Argument (Indianapolis: The Bobbs-Merrill Company, Inc., 1972), p. 28.

[5]Douglas Ehninger and Wayne Brockriede, Decision by Debate (New York: Dodd, Mead & Company, 1971), p. 89.

[6]Austin J. Freeley, Argumentation and Debate: Rational Decision Making (Belmont, California: Wadsworth Publishing Company, Inc., 1976), pp. 39-40.

[7]Freeley, pp. 39-40.

[8]Smith and Hunsaker, p. 31.

[9]Smith and Hunsaker, p. 32.

[10]Smith and Hunsaker, p. 60.

[11]Towne and Weiss, p. 63.

[12]George W. Ziegelmueller and Charles A. Dause, Argumentation: Inquiry and Advocacy (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1975), p. 8.

[13]Smith and Hunsaker, p. 32.

[14]Mr. Justice Owen Roberts, Snyder v. Massachusetts, 291 US 97, 137 (1934).

[15]Mr. Justice Felix Frankfurter dissenting, Bridges v. California, 314 US 252, 283 (1941).

[16]Mr. Justice Hugo Black dissenting, Cox v. Louisiana, 379 US 559, 583 (1965).

[17]Smith and Hunsaker, p. 40.

[18]Smith and Hunsaker, pp. 130-131.

[19]See Ehninger and Brockriede, p. 89.

[20]Stephen Toulmin, Richard Rieke, and Allan Janik, An Introduction to Reasoning (New York: Macmillan Publishing Co., Inc., 1979), p. 207.

[21]Towne and Weiss, p. 64.

[22]Towne and Weiss, p. 64.

[23]Towne and Weiss, p. 64.

[24]Towne and Weiss, p. 65.

[25]Towne and Weiss, p. 65.

[26]Towne and Weiss, p. 67.